

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

MUTHIAH CHETTI AND OTHERS (ACCUSED-APPELLANTS),
PETITIONERS,

v.

EMPEROR, RESPONDENT.*

1905
October 16,
17.

Criminal Procedure Code—Act V of 1898, s. 106—Appellate Court cannot bind over to keep peace when Lower Court not one of the class referred to in the section, and no breach of the peace committed.

An accused person cannot be bound over to keep the peace under section 106 of the Code of Criminal Procedure unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred.

An Appellate Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section.

THE petitioners in this case were charged with several others, in all numbering 100, with having demolished the roof of a shed belonging to P. W. 13. They were tried before the Second-class Magistrate of Tiruppattur, and their defence was that the land was the property of the first accused and that they had a right to demolish the shed. The Sub-Magistrate convicted the accused of offences under sections 147 and 426 of the Indian Penal Code and passed sentences of fines on them. He found that no force or violence had been used to any person.

On appeal by the petitioners, the conviction under section 426 was set aside and the conviction under section 147 was altered to one under section 143. The sentences were confirmed, and in addition, the first accused was bound over under section 106 of the Code of Criminal Procedure to keep the peace for one year in two sureties of Rs. 500 each, and the rest in two sureties of Rs. 50 each.

* Criminal Revision Case No. 146 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. Thompson, Esq., Sub-Divisional Magistrate of Ramnad Division, in Criminal Appeal No. 28 of 1905 (Calendar Case No. 726 of 1904 on the file of the Second-class Magistrate of Tiruppattur).

The accused preferred this criminal revision petition.

Sir *V. Bhashyam Ayyangar* for first and second petitioners.

Mr. *M. A. Thirunarayana Chariar*, *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for petitioners Nos. 3 to 6.

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The Public Prosecutor (*Mr. Powell*) in support of the conviction.

JUDGMENT.— The appellants have been convicted of being members of an unlawful assembly and have been fined under section 143, Indian Penal Code. They have also been bound over to keep the peace under section 106, Criminal Procedure Code.

We are clearly of opinion that the conviction was right. It is found that the appellants with others to the number of 100 armed with aruvals, sticks, etc., went to a piece of land claimed by the prosecutor with the object of taking possession of it and demolishing a building upon it and though no force or violence was used—that was because the prosecution party were overawed and did not come into conflict with them.

It is however contended, and we think rightly, that the accused in the circumstances of this case were improperly bound over to keep the peace under section 106, Criminal Procedure Code, inasmuch as (1) they were convicted by a Second-class Magistrate only and not before a Court such as is named in the section and (2) they have not been convicted of an offence involving a breach of the peace.

We think that the power given to an Appellate Court to make an order under this section is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the Appellate Court power to do only that which the lower Court could and should have done, and therefore, that the power of the Court to pass such an order is confined to cases where the conviction has been by a Court named in the section and in circumstances required by the section.

It has been held that the words "involving a breach of the peace" in the section, require that a breach of the peace should be an ingredient of the offence proved, and that before the section can be put in force there must be a finding that a breach of the peace has occurred [see *Baidya Nath Majumdar v. Nibaran Chunder Gope* (1) and *Kannookaran Kunhamad and others v.*

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Emperor (1)]. As in this case there was no finding that a breach of the peace had been committed, and the offence for which the accused were convicted did not necessarily involve a breach of the peace and no breach of the peace was in fact committed, we set aside the order requiring the accused to give security for keeping the peace, and the bonds if already executed will be cancelled.

Except as above, we affirm the convictions and sentences.

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Before Mr Justice Boddam and Mr Justice Moore.

1905
December 11.

EMPEROR

v.

RAMASAWMY RAJU.*

Madras District Police Act XXIV of 1859, s. 44—Police constable not returning to duty after expiry of leave guilty of offence under.

A police constable, who, having obtained casual leave, does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under section 44 of Act XXIV of 1859 of the offence of 'ceasing to perform the duties of his office without leave.'

THE facts necessary for this report are set out in the judgment.

The Public Prosecutor (*Mr. Powell*) for appellant.

JUDGMENT.—We think the order of acquittal in this case must be set aside.

The accused, a police constable, was charged under section 44 of Act XXIV of 1859 with "ceasing to perform the duties of his office without leave." It appears that he applied for leave which was refused. He then obtained three days' casual leave, and whilst on such leave again applied for long leave which was again refused. He did not however return to duty at the expiry of his casual leave but stayed away without leave. Having stayed away from duty for over one month sanction was granted for his

(1) I.L.R., 26 Mad., 469.

* Criminal Appeal No. 298 of 1905, presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Criminal Appeal No. 101 of 1904 by M. R. Ey. C. S. Anantarama Ayyar, Sub-Divisional Magistrate of Malur Division (Calendar Case No. 993 of 1904 on the file of the Stationary Third-class Sub-Magistrate, Madura Town).